United Malayan Banking Corp v Yap Peng Wai @ Yap Peng Hooi

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–533 OF 1995
MOHD HISHAMUDIN J
1 JULY 1997

Civil Procedure *— Action — Discontinuance of — Whether withdrawal of action by way of notice of discontinuance constitute an estoppel barring plaintiff from instituting present action — Rules of the High Court 1980 O 21 r 4*

Civil Procedure *— Interest — Order for sale under National Land Code 1965 — Whether contractual rate of interest or statutory rate of interest applicable — Rules of the High Court 1980 O 42 r 12*

Evidence *— Affidavit — Admissibility of — Whether affidavit contained such facts as deponent was able of his own knowledge to prove — Rules of the High Court 1980 O 41 r 5(1)*

Limitation *— Charge — Application for an order for sale of charged land — Whether action time-barred — When cause of action arose — Limitation Act 1953 s 21*

The defendant had charged his land to the plaintiff to secure overdraft facilities granted to a third party. The third party failed to make repayment. The plaintiff filed an originating summons seeking for an order for the sale of the defendant's land under s 256 of the National Land Code 1965. The defendant raised several issues to contest the present action, ie: (i) the affidavits filed by the plaintiff were inadmissible on the ground of hearsay as the deponents had no personal knowledge of their contents. It was argued that the affidavit should be affirmed by one Mr Ng who was the plaintiff's manager at the time the charge was executed. Instead, the affidavits were affirmed by Mr Tan Guan Seng and Mr Tan Cheng Eu ('the deponents') who had since taken over from Mr Ng; (ii) the plaintiff was estopped from filing this application because an originating summons relating to the same charge on the same land had been filed previously to which the plaintiff subsequently filed a notice of discontinuance; (iii) the action being contractual in nature, should have been instituted within six years as required under s 6 of the Limitation Act 1953; and (iv) there were cause to the contrary as to why this application should not be allowed, namely: (a) excessive rate of interest, ie more than 8% pa as stipulated by O 42 r 12 of the Rules of the High Court 1980 ('the RHC'); and (b) there was an agreed discharge of the charge by the plaintiff.

Held, allowing the plaintiff's application:

(1) In the present case, the facts deposed in the affidavits, alleged to be hearsay, related to a commercial transaction between two private persons. And, the facts deposed were not facts known

only to Mr Ng but were information contained in the books and records kept by the plaintiff which the deponents, as managers of the plaintiff, had access, control and supervision. The affidavits of the deponents satisfy the requirements as stipulated by O 41 r 5(1) of the RHC. The deponents deposed in their respective affidavits that they were the managers of the plaintiff which processed the loan and that the facts stated in their affidavits were based on their knowledge as well as on records and documents kept at that branch office, to which they have access. Therefore, the affidavits filed as well as the supporting documents exhibited were admissible. The court disagreed with the contention that only Mr Ng could have the 'knowledge' for the purpose of r 5(1). The provision cannot be given such a narrow interpretation (see pp 516I and 517A–E); *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 distinguished.

(2) By virtue of O 21 r 4 of the RHC, the withdrawal of the first originating summons by way of notice of discontinuance did not constitute an estoppel barring the plaintiff from instituting the present action (see p 517H–I).

(3) The present action was a foreclosure action to recover money secured by a charge and the law that was applicable was not s 6 but s 21 of the Limitation Act 1953 which provides that the action should be instituted within the period of 12 years. Time started to run only from the date the demand was made and that, from the evidence adduced, was when the plaintiff's solicitors issued on the defendant the letter of demand of 24 May 1993. The institution of this case in 1995 was clearly well within the 12-year period (see p 518B–I); *Wee Kee Puan v Oversea-Chinese Banking Corp Ltd* [1982] 1 MLJ 64 followed.

(4) The plaintiff was entitled to claim the interest rate of 11.5% pa as the rate claimed was below the rate agreed to by the parties at the time the charge was executed. Moreover, based on authority, O 42 r 12 of the RHC does not apply to the present case (see p 519F); *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 followed.

(5) A scrutiny of the letter sent by the plaintiff directing the solicitors to discharge the charge on the land would reveal that two land titles were forwarded to the solicitors for the purposes of discharging the charges on two separate pieces of land. The plaintiff's instructions to the solicitors were clear and that was to return the first title to the owner whereas the defendant's title was to be returned to the plaintiff as there was still an existing charge for an overdraft (see p 521E–F).

[Bahasa Malaysia summary

Defendan telah menggadai tanahnya kepada plaintif untuk menjamin kemudahan overdraf yang diberikan kepada pihak ketiga. Pihak ketiga

gagal membuat bayaran balik. Plaintif memfailkan satu saman pemula meminta perintah untuk jualan tanah defendan di bawah s 256 Kanun Tanah Negara 1965. Defendan membangkitkan pelbagai isu untuk menentang tindakan ini, iaitu: (i) afidavit-afidavit yang difailkan oleh plaintif tidak boleh diterima disebabkan dengar cakap kerana saksi sumpah tidak mempunyai sebarang pengetahuan peribadi tentang kandungannya. Ia dihujahkan bahawa afidavit harus diikrarkan oleh seorang bernama En Ng yang merupakan pengurus plaintif pada masa gadaian dilaksanakan. Sebaliknya, afidavit-afidavit diikrarkan oleh En Tan Guan Seng dan En Tan Cheng Eu ('saksi-saksi sumpah tersebut') yang sejak itu telah mengambil alih daripada En Ng; (ii) plaintif diestop daripada memfailkan permohonan kerana satu saman pemula berkaitan dengan gadaian yang sama atas tanah yang sama telah difailkan lebih awal yang mana plaintif kemudiannya memfailkan notis pemberhentian; (iii) memandangkan tindakan bersifat kontraktual, ia sepatutnya dimulakan dalam tempoh enam tahun seperti yang dikehendaki di bawah s 6 Akta Had Masa 1953; dan (iv) terdapat sebab-sebab sebaliknya tentang mengapa permohonan ini tidak patut dibenarkan, yakni: (a) kadar faedah yang melampaui, iaitu lebih daripada 8% setahun seperti yang disyaratkan oleh A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (b) terdapat suatu pelepasan gadaian yang dipersetujui oleh plaintif.

Diputuskan, membenarkan permohonan plaintif:

(1) Dalam kes ini, fakta-fakta yang dideposkan dalam afidavit-afidavit, yang dikatakan adalah dengar cakap, berkaitan dengan transaksi dagangan di antara dua orang persendirian. Dan, fakta-fakta yang dideposkan tidak merupakan fakta yang diketahui oleh En Ng sahaja tetapi adalah maklumat yang terkandung dalam buku-buku dan rekod yang disimpan oleh plaintif yang mana saksi-saksi sumpah tersebut, sebagai pengurus plaintiff, mempunyai akses, kawalan dan penyeliaan. Afidavit-afidavit saksi-saksi sumpah tersebut memenuhi keperluan seperti yang disyaratkan oleh A 41 k 5(1) KMT. Saksi-saksi sumpah tersebut mendeposkan dalam afidavit masing-masing bahawa mereka adalah pengurus plaintif yang memproseskan pinjaman dan bahawa fakta-fakta yang dinyatakan dalam afidavit mereka adalah berdasarkan pengetahuan mereka serta pada rekod dan dokumen yang disimpan di pejabat cawangan itu, yang mana mereka mempunyai akses. Maka, afidavit-afidavit yang difailkan serta dokumen menyokong yang ditunjukkan boleh diterima. Mahkamah tidak bersetuju dengan hujah bahawa En Ng sahaja boleh memiliki 'pengetahuan' untuk tujuan k 5(1). Peruntukan itu tidak boleh diberikan tafsiran yang begitu sempit (lihat ms 516I dan 517A–E); *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 dibeza.

(2) Disebabkan A 21 k 4 KMT, penarikan balik saman pemula pertama menerusi notis pemberhentian tidak membentuk estopel yang menghalang plaintif daripada memulakan tindakan ini (lihat ms 517H–I).

(3) Tindakan sekarang ini adalah tindakan penutupan gadai janji bagi mendapat balik wang yang dicagar oleh gadaian dan undang-undang yang terpakai bukannya s 6 tetapi s 21 Akta Had Masa 1953 yang memperuntukkan bahawa tindakan seharusnya dimulakan dalam tempoh 12 tahun. Masa hanya bermula dari tarikh tuntutan dibuat dan, daripada keterangan yang dikemukakan, adalah apabila peguamcara plaintif mengeluarkan surat tuntutan bertarikh 24 Mei 1993 kepada defendan. Permulaan kes ini pada tahun 1995 jelas berlaku dalam tempoh 12 tahun (lihat ms 518B–I); *Wee Kee Puan v Oversea-Chinese Banking Corp Ltd* [1982] 1 MLJ 64 diikut.

(4) Plaintif berhak menuntut kadar faedah 11.5% setahun kerana kadar yang dituntut adalah jauh di bawah kadar yang disetujui oleh pihak-pihak sewaktu gadaian dilaksanakan. Tambahan pula, berdasarkan autoriti, A 42 k 12 KMT tidak terpakai kepada kes ini (lihat ms 519F); *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 diikut.

(5) Penelitian surat yang dihantar oleh plaintif mengarahkan peguamcara supaya melepaskan gadaian atas tanah akan mendedahkan bahawa dua hakmilik tanah telah dikemukakan kepada peguamcara untuk tujuan melepaskan gadaian atas dua bidang tanah yang berasingan. Arahan plaintif kepada peguamcara adalah jelas iaitu supaya mengembalikan hakmilik pertama kepada pemilik manakala hakmilik defendan haruslah dikembalikan kepada plaintif kerana masih terdapat gadaian yang wujud untuk overdraf (lihat ms 521E–F).]

Notes

For cases on discontinuance of action, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 66–69 and 1134–1140.

For cases on interest, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1726–1768.

For cases on admissibility of affidavit, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 120–122.

For cases on limitation where a charge is involved, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1800–1802.

Cases referred to

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (distd)

Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (folld)

Wee Kee Puan v Oversea-Chinese Banking Corp Ltd [1982] 1 MLJ 64 (folld)

Legislation referred to

Federal Territory (Planning) Act 1982 s 22
Limitation Act 1953 ss 6, 21
National Land Code 1965 ss 254, 256
Rules of the High Court 1980 O 21 r 4, O 41 r 5, O 42 r 12

Felix Raj (*Shearn Delamore & Co*) for the plaintiff.
Yeang Kok Yeang (*Yeang & Co*) for the defendant.

Mohd Hishamudin J: The plaintiff's originating summons is pursuant to s 256 of the National Land Code 1965 ('the NLC'). The plaintiff seeks an order for the sale of the defendant's land held in Surat Putus Besar No 65468 Allot 35, Kulim, Kedah ('the land').

The facts as averred by the plaintiff through the affidavits sworn by its agents are straightforward. The plaintiff alleges that the defendant had, vide charge registered as Jilid No 132 Folio 86, Perserahan No 251/84 ('the charge') charged the land to the plaintiff. In consideration thereof the plaintiff granted overdraft facilities to a third party, a company known as Poly Cars Sdn Bhd ('Poly Cars'). When Poly Cars failed to make the repayments, the plaintiff issued a notice of demand against the defendant on 24 May 1993. Despite this notice of demand, the debt due remained unsatisfied. Thus, the plaintiff took steps to enforce the charge. Pursuant to s 254 of the NLC, the plaintiff served Form 16D not only by way of the plaintiff solicitors' letter of 24 June 1993 but also by way of publication in *The Malay Mail* on 11 August 1995. As Form 16D also failed to solicit any repayment, the present proceeding was instituted.

Several issues were raised by the defendant through his learned counsel, En Yeang Kok Yeang, to contest the present action. But I will deal with the following three issues first. The issues are:

(i) that the affidavits filed by the plaintiff are inadmissible as the deponents of the affidavits have no personal knowledge of their contents;

(ii) that the plaintiff are estopped from filing this application on grounds of res judicata; and

(iii) that limitation has set in.

The parties are on common ground that at the time the charge was executed the manager of the plaintiff's branch in Kulim was one En Ng Hoong Chiew ('En Ng'). However, the affidavits filed by the plaintiff (encls 2, 35, 40, 48, 53 and 68) were affirmed and sworn by En Tan Guan Seng and En Tan Cheng Eu. Both these deponents had since taken over from En Ng as the Kulim branch manager and were acting in the said post at the time the respective affidavits were affirmed. It is the defendant's contention that the affidavits should have been affirmed by En Ng himself as only he had personal knowledge of the matter. Encik Yeang submits that the affidavits are inadmissible on the ground of hearsay and, therefore, there is no evidence before this court to support the plaintiff's case. He cites *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 in support of his argument.

In *Datuk Bandar*, the Datuk Bandar, Kuala Lumpur, had appealed against the decision of the High Court which had ruled in favour of the respondent (landowner). The Datuk Bandar had allowed an application by a company known as Tradium Sdn Bhd to develope a land adjoining to the respondent's land. By so doing, the density of the locality of the subject property was increased as Tradium Sdn Bhd had proposed to build apartments. Before the Court of Appeal, the respondent again submitted, inter alia, on the issue of the admissibility of the affidavit filed by the appellant. The affidavit filed before the High Court giving reasons for the grant of the approval was deposed by one Mokhtar bin Long Idris, a subordinate officer of the appellant who had been delegated with the duty of conducting the inquiry whereas it was the Datuk Bandar himself who had made the decision to grant the approval to Tradium Sdn Bhd. The Court of Appeal ruled (at p 36):

> ... In this affidavit, the deponent purports to set out the reasons why Tradium received planning approval. *But it is the appellant's case that the decision to grant Tradium planning approval was made by none other than the appellant himself.* In these circumstances, all that Mokhtar bin Long Idris had to say about the matter was pure hearsay. (Emphasis added.)

Although the Court of Appeal did rule in this case that the affidavit sworn by a deponent other than the decision-maker amounts to hearsay, I am of the view that *Datuk Bandar* can be distinguished from the case before me. In that case, it was an application for a certiorari to quash the decision of a public body. The decision was made by the Datuk Bandar personally as required by s 22 of the Federal Territory (Planning) Act 1982 which reads as follows:

> 22 (1) The Commissioner [ie the Datuk Bandar] shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to the provisions of sub-s (4) and s 23.
>
> ...
>
> (5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

The above provision also requires the Datuk Bandar to give his reasons in writing for the decision. It was, therefore, inappropriate for the said En Mokhtar bin Long Idris to depose the reasons for the Datuk Bandar's decision. In the present case, however, the facts deposed in the affidavits, alleged to be hearsay, relate to a commercial transaction between two private persons. And, the facts deposed were not facts known only to Encik Ng but were information contained in the books and records kept by the plaintiff over the deponents, as managers of the plaintiff branch in

A Kulim, had access, control and supervision. Order 41 r 5 of the Rules of the High Court 1980 ('the RHC') reads as follows:

> 5 Contents of affidavit
>
> (1) Subject to Order 14 rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain
B only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

It is my judgment that in the present case the affidavits of En Tan Guan
C Seng and En Tan Cheng Eu satisfy the requirements as stipulated by O 41 r 5(1). For both these gentlemen deposed in their respective affidavits that they were the managers of the plaintiff's Kulim branch office which processed the loan and that the facts stated in their affidavits were based on their knowledge as well as on records and documents kept at that
D branch office, to which they have access. I, therefore, rule that the affidavits filed as well as the supporting documents exhibited are admissible. With respect, I am unable to accept En Yeang's argument that only the person who was the Kulim branch manager at the time the charge was executed would be in a position to depose the facts pertaining to the charge. In other words, it is his contention that only En Ng could have the 'knowledge' for
E the purpose of r 5(1). To my mind, we cannot give the provision such a narrow interpretation.

The defendant's plea of res judicata is raised in relation to a case namely, Originating Summons No 31–343–86, that was previously instituted by the plaintiff against the defendant. The case related to the
F same charge on the same land. The prayers sought in Originating Summons No 31–343–86 were also substantially the same as the prayers sought in the present case. In that case, before it was due to be heard, the plaintiff had filed a notice of discontinuance on 29 October 1986. It is the defendant's contention that this notice of discontinuance amounted to an estoppel barring the plaintiff from instituting the present action. In reply,
G the plaintiff explains that as the merits of the said case was never adjudicated upon and that the case was withdrawn with liberty to file afresh, it was still entitled to file the present action.

The answer to this issue lies in O 21 r 4 of the RHC which states:

> 4 Effect of discontinuance
>
> H Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same cause of action.

I It is my judgment that the withdrawal of Originating Summons No 31–343–86 by way of the said notice of discontinuance does not constitute an estoppel barring the plaintiff from instituting the present action.

On the question of limitation, En Yeang contends that the action being contractual in nature, it should have been instituted within six years as required under s 6 of the Limitation Act 1953. And, time should start to run from the date the case Originating Summons No 31–343–86 was filed, and that was 13 July 1986.

With respect to learned counsel for the defendant, I am unable to accept his contention. The present action is a foreclosure action to recover money secured by a charge and the law that is applicable is not s 6, as submitted by learned counsel for the defendant, but s 21 of the Limitation Act 1953 which provides:

> 21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.
>
> (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:
>
> Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

And, in determining when the period of 12 years should start to run it would be relevant to refer to the Federal Court decision in *Wee Kee Puan v Oversea-Chinese Banking Corp Ltd* [1982] 1 MLJ 64 wherein it was held (at p 65):

> It is settled law that for the purpose of the statute of limitation as regards overdraft, the cause of action against the borrower arises everytime an advance is made by the bank and that no demand for repayment of debt is necessary for the accrual of the cause of action, unless there is a term in the overdraft agreement requiring such notice — *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, *Bian Chiang Bank Bhd v Kwong Hing Cheong* [1978] 2 MLJ 193. *On the other hand, the cause of action against a person who stood as a surety for an overdraft facility only accrues when a demand for repayment is made to the surety — Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833. (Emphasis added.)

Applying the above principle of law to our case, time started to run only from the date the demand was made and that, from the evidence adduced, was when the plaintiff's solicitors issued on the defendant the letter of demand of 24 May 1993 (exh TCE-2 of encl 1) which was posted on 25 May 1993. The institution of this case in 1995 is clearly well within the 12-year period.

Having disposed off the above issues, I shall now consider whether there is any cause to the contrary as to why this application should not be allowed.

A Encik Yeang submits that there is a cause to the contrary for two reasons. First, by reason of the excessive rate of interest claimed. Second, it is alleged that there was an agreed discharge of the charge by the plaintiff.

In para 6 of the affidavit in support of the application, the plaintiff claims interest of 11.5% pa. The defendant contends that this rate is B excessive by reason of O 42 r 12 of the RHC which provides as follows:

> 12 Interest on judgment debts
>
> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at any such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between C the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

It is submitted that the permissible rate should be restricted to only 8% pa and no more. No reason, however, was offered by counsel for the defendant as to why O 42 should apply. The plaintiff does not deny that it is claiming D an interest in excess of 8% pa but maintains that it is entitled to claim an interest of 13% pa as that was the rate agreed to by the parties at the time the charge was executed. The plaintiff further explains that it had obtained judgment in Civil Suit No D4–23–1780–1988, filed at the High Court in Kuala Lumpur against Poly Cars, the defendant and five others for non-payment of the overdraft facility granted to Poly Cars. As this judgment of E 12 Sept 1990 (exh TGS-1 in encl 48) allowed interest of 11%, it is also claiming the same rate in the present application.

I notice that there is a slight inaccuracy in the plaintiff's submission. Although the plaintiff claims that it is claiming the rate of interest allowed by the High Court in Civil Suit No D4–23–1780–1988, which is 11% pa, F it is actually claiming 11.5% pa. But, be that as it may, the error is not fatal to its claim today as the rate claimed is below the contracted rate (13% pa). Moreover, O 42 r 12 of the RHC does not apply to the present case. Encik Felix Raj, learned counsel for the plaintiff, had submitted a case which is directly in point, that is, the Supreme Court decision in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257. G In that case, the appellant had obtained an order for sale of certain lands belonging to the respondent. The learned trial judge, after ordering the charged land to be sold by public auction under s 257 of the NLC, directed that the interest should run at the rate of 8% pa purportedly in pursuant to O 42 r 12 of the RHC. Seah SCJ at p 258 said:

H
> Applying this to the facts of this case and since there was no judgment debt, the learned judge was wrong to apply O 42 r 12. In our opinion, the *Supreme Finance*'s case [*Supreme Finance (M) Bhd v Koo Sin Ken* [1987] 1 MLJ 296] is only authority for the proposition that the maximum rate of interest which may be allowed by the High Court in a judgment debt is 8% pa until full realization. And *O 42 r 12 of the High Court Rules 1980 has no application* I *to any court order made pursuant to s 257 of the National Land Code 1965.* We therefore allow the appellant's appeal. (Emphasis added.)

Finally, was there then an agreed discharge between the parties as contended by the defendant? As an attempt to prove the alleged discharge, the

defendant produced two documents, exh YPH-2 in encl 34 and exh YPH-4 in encl 44. Exhibit YPH-4 in encl 44 was a letter from the plaintiff to the solicitors firm of Messrs Zainal Azahar & Co directing the solicitors to discharge the charge on the land. Exhibit YPH-2 in encl 34 was a copy of a letter by the same solicitors firm requesting payment of professional fees from the defendant for the discharge of a charge on the land. Based on these documents, the defendant contends that there is no longer any charge on the land available for the plaintiff to enforce. The plaintiff admits having instructed Messrs Zainal Azahar & Co to discharge a charge on the land. However, it explains that there were in fact two charges executed on the defendant's land as the same piece of land had been used to secure two forms of credit facilities for Poly Cars, that is, a fixed loan and an overdraft. Exhibit YPH-4 in encl 44 was issued to instruct Messrs Zainal Azahar & Co to discharge the charge known as Jilid 132, Folio 87, Perserahan No 252/84 (tendered as exh TGS-4) that was used to secure the fixed loan as that credit facility had been repaid in full. But the subject matter of today's application is the second charge on the same piece of land which had been executed to secure the overdraft facility which, until today, remains unpaid.

The following letter, exh YPH-4 in encl 44, is relied on by the defendant:

17 March 1986

M/S Zainal Azahar & Co,
Advocates & Solicitors,
No lA, Tingkat Atas,
Bangunan Aked MDKT,
Jalan Tunku Asaad,
09000 Kulim,
Kedah Darul Aman.

Dear Sir,

Re: Discharge of Titles Nos HS(D) 283 Sek 6 Lot 1238 BM
All Lot 26, Sek 35 and Grant 65648 Town of Kulim

Enclosed are:

(1) The above two titles;

(2) Duplicate charges under presentation 874/84 and 873/84 (for the BM Title); and

(3) Duplicate charge under presentation 252/84 (for the Kulim Title).

Please discharge the existing charges. Upon discharge, Title No HS (D) 253 Sek 6 Lot 1238 is to be returned to the owner.

Grant 65468 is to be returned to us for safekeeping as there is an existing charges for an overdraft. (Emphasis added.)

Please acknowledge receipt on the duplicate.

A Yours faithfully,

[Signature]

cc

The Regional Head
B Northern Region Office
UMBC Head Office
Kuala Lumpur

Poly Cars Sdn Bhd
1370 Jalan Kulim
C 14000 Bukit Mertajam

Lim Sin Fong
c/o 85 Jalan Sentosa
14000 Bukit Mertajam

D Mr Yap Peng Hooi
Litronix Head Sdn Bhd
Bayan Lepas Free Trade Zone
11900 Bayan Lepas
Penang

E A scrutiny of this letter would show that this letter is consistent and supports the plaintiff's explanation. Two land titles were forwarded vide this letter to the solicitors for the purpose of discharging the charges on two separate pieces of land. The plaintiff's instructions to the solicitors were clear and that was to return the first title to the owner whereas the defendant's title, Grant 65648, was to be returned to the plaintiff for
F safekeeping as there was still an existing charge for an overdraft.

I also note that the fact about the execution of two charges on the land was known to the defendant as he had, through his solicitor's letter of 10 September 1987, made enquiries about the status of the credit facilities obtained through the execution of both the charges on his land. The letter
G exhibited as exh TGS-2 of encl 48 appears as follows:

10 September 1987

United Malayan Banking Corp Bhd
44-45 Jalan Raya, Kulim
H Kedah

Dear Sirs

Re: (1) Sek 35 Bandar Kulim, Daerah Kulim, Kedah Allot 26, Surat Putus Besar No 65468
(2) Poly Cars Sdn Bhd
I

We act for Mr Yap Peng Hooi c/o Litronix Malaysia Sdn Bhd, Bayan Lepas Free Trade Zone, Bayan Lepas, Penang, the registered owner of of aforesaid.

We are informed that *on 15 December 1983 our client by way of first and second legal charges executed same with United Malayan Banking Corporation*

Bhd, Kulim for benefit of Poly Cars Sdn Bhd to secure repayment of two loans of RM60,000 and RM100,000 respectively. (Emphasis added.)

In view of notice of default dated 31 October 1986, we are instructed by our client to request for the monthly Statement of Accounts of M/s Poly Cars Sdn Bhd vide account C/A No 2723 from 1 May 1983 to 1 November 1986.

We shall be obliged if the aforesaid accounts could be sent to us soonest possible.

We will pay your photocopying charges on receipt of same.

Thank you

Yours faithfully

[signature]

cc Client

Accordingly, the plaintiff's application is allowed with costs and I direct that the land be sold by public auction on 1 October 1997.

Plaintiff's application allowed.

Reported by Jafisah Jaafar